ABDUL FATTAH MOGAWAN & ANOR *a*

v.

MMC POWER SDN BHD & ANOR (NO 2)

HIGH COURT MALAYA, KUALA LUMPUR *b*
RK NATHAN J
[CIVIL SUIT NO: S2-22-347-1996]
25 FEBRUARY 1998

COMPANY LAW: *Agency - Principal and agent - Apparent authority - Liability of principal - Whether agent had ostensible authority to act on behalf of principal - Whether agent acted outside scope of authority - Whether an employee of principal - Definition of ostensible authority* *c*

CONTRACT: *Agency - Principal and agent - Contract for recruitment of foreign workers - Refusal to offer employment - Whether defendants in breach of contract - Claim for agency fees, recruitment expenses and loss of earnings - Whether defendants liable - Whether damages were pure economic loss - Whether recoverable* *d*

The plaintiffs were citizens of the Philippines and were licensed by their government to act as agents for the supply of Filipino workers to Malaysia. *e* The plaintiffs claimed that the defendants had sought their services to supply Filipino workers ('workers') for the defendants' projects in Malaysia, but had breached their promise to employ the workers after the workers had been recruited at the plaintiffs' expense. The facts showed that, acting on a power of attorney and a job order shown them by the defendants' employee and agent *f* ('Ali'), the plaintiffs had commenced recruitment exercise in the Phillippines and had recruited 121 Filipinos for the defendants. The plaintiffs had also expended money to process the necessary exit and work permits for the workers. Having thus 'prepared' the workers for their employment with the defendants, the plaintiffs then requested from the defendants the promised air *g* tickets to fly the workers to Malaysia. The defendants, however, refused to send the air tickets in question, claiming that Ali was not their employee, representative or agent, and therefore, had no express or implied authority to issue any document pertaining to the recruitment of the workers. The plaintiffs had suffered heavy losses as a result, and had also been subjected to *h* investigation by the Department of Justice, National Bureau of Investigation, Phillippines, on charges of economic sabotage. The plaintiffs, who had since fled their country to Malaysia, filed a claim against the defendants *inter alia* for loss of agency fees, expenses incurred to recruit the workers and loss of earnings. Before the learned judge herein, the primary questions that arose were (i) whether Ali was the representative or employee of the defendants; (ii) *i*

whether Ali, on the facts, had implied or express authority to act on behalf of the defendants; (iii) whether there was breach of contract; and (iv) whether damages as claimed by the plaintiffs were pure economic loss and therefore not recoverable.

Held:

[1] By their pleadings, the defendants had admitted that Ali was at the material time their employee. The pleadings aside, the evidence also showed that Ali was legally the employee of the 1st defendant, but was treated by both defendants interchangeably as one of the 2nd defendant's employee or agent.

[2] When a case arises in which the company denies that it gave, expressly or impliedly, authority to the employee to enter the transaction, the company may nevertheless be held liable under the doctrine of ostensible authority. In the present case, the 1st defendant had clearly made a representation to the plaintiffs that Ali had authority to act as its project manager and consequently to source for labour.

[2a] In any case, the "indoor management" rule in *Morrie v. Kanssen* which was enacted in s. 20 of our Companies Act 1965, should apply, and the defendants ought not to be allowed to rely on their internal arrangements or procedures to defeat the plaintiffs' claim. This must be so as the defendants had not proved that the plaintiffs had knowledge of such internal arrangements or procedures.

[3] The defendants, in failing to fulfill the employment agreements with the Filipino workers, and in failing to send them the air tickets and to employ them, had clearly breached their contractual duty and had deprived the plaintiffs of their rightful opportunity to earn their commission. The defendants are therefore liable to the plaintiffs.

[4] A claim for pure economic loss ought to be considered in an action for negligence and not be confined to cases of contractual liability only. Such limitations imposed on its applicability are inequitable and do not serve the ends of justice. The submission that losses allegedly suffered by the plaintiffs were pure economic losses and were denied recovery by the law must therefore be rejected.

[5] The plaintiffs' claim for expected agency loss ought to be allowed. In the circumstances of the case, a sum of RM85,200 representing 50% of the plaintiffs' claim under this heading should be awarded to the plaintiffs. The plaintiffs ought also to be reimbursed on the amount that

they had collected from the workers, and for this a sum of RM60,500 should bes awarded. In respect of the loss of earnings, the plaintiffs had shown that they had earned approximately RM450,000 which approximation the defendants had not challenged. However, bearing in mind the down trend in the demand of foreign workers, the plaintiffs might have only earned RM120,000 per year. And since the plaintiffs have been in Malaysia for 1¾ years, a sum of RM210,000 less 30% tax should be awarded for this claim.

[5a] Special damages are a category into themselves and must be specifically pleaded and proved. The plaintiffs had not specifically proved each item claimed. There is therefore no award for special damages.

[Judgment for plaintiffs; order accordingly.]

Case(s) referred to:

Bonham-Carter v. Hyde Park Hotel, Ltd [1984] 64 TLR 177 ***(refd)***

Chew Hock San & Ors v. Connaught Housing Development Sdn Bhd [1950-1985] MSCLC 145 ***(refd)***

Dr Abdul Hamid Abdul Rashid & Anor v. Jurusan Malaysia Consultants & Ors [1997] 3 MLJ 546 ***(refd)***

Freeman & Lockyer v. Buckhurst Park Properties (Mangal) Ltd & Anor [1964] 2 QB 480 at 503 ***(refd)***

Junior Books Ltd v. Veitchi Co Ltd [1982] 3 All ER 201 ***(refd)***

Kerajaan Malaysia v. Cheah Foong Chiew & Anor [1993] 3 CLJ 143 ***(refd)***

Morris v. Kanssen [1946] AC 459 ***(refd)***

Teh Khem On & Anor v. Yeoh & Wu Development Sdn Bhd & Ors [1996] 2 CLJ 1105 ***(refd)***

Legislation referred to:

Companies Act 1965, s. 20

Other source(s) referred to:

Principles of Company Law, Prof HAJ Ford

For the plaintiffs - Tunku Alina Alias (Andrew Teh with her); M/s Wong Lu Peen & Tunku Alina

For the defendants - Collin Sequerah; M/s Zain & Co

Reported by WA Sharif

a

JUDGMENT

RK Nathan J:

Case For The Plaintiff

b The plaintiffs are citizens of the Philippines and presently reside in Malaysia. They established a company called Minar International Company (MIC) and were licensed by their government to act as an agent to supply Filipino workers to Malaysia. The plaintiffs contend that by way of a letter dated 1 July 1995 the 1st defendant requested from the plaintiffs a supply of 490 Filipino workers for the defendants for their projects. The defendants also c agreed that they would provide for an air ticket from the Philippines to Malaysia for each worker selected by the plaintiffs.

Pursuant to the said request the plaintiffs proceeded to advertise for workers both in the newspapers and through the radio. On 11 August 1995, one d Muhamad Ali of the defendants had flown to the Philippines with PW2 to commence the recruitment exercise. Muhamad Ali brought with him a power of attorney dated 11 July 1995 together with a job order dated 11 July 1995 which was handed over to the 1st plaintiff. Both documents had been duly attested by a Commissioner of Oaths and accredited by Wisma Putra and the e Philippines Embassy. With the assistance of the personnel from the defendants the plaintiffs were able to recruit 121 workers. The 2nd defendant then made the necessary application with the Malaysian Immigration authorities for the work permits for the said workers.

The 2nd defendant having obtained the approval from the Immigration f Department forwarded to the plaintiffs the said approval letter together with all other relevant documents to enable the plaintiffs to obtain the relevant medical clearance and exit permits and the visa applications from the Malaysian Embassy in Manila for the said workers. The workers then resigned from their respective employments to prepare themselves for their departure g to Malaysia.

Having completed all that was required of them the plaintiffs then requested from the defendants for the air tickets for the workers. However, the tickets were not forthcoming. As a result the plaintiffs contended that they suffered heavy losses. h

Upon reports made by the workers against the plaintiffs the plaintiffs were investigated by the Philippines National Bureau of Investigations on a charge of illegal recruitment and were accused of sabotaging the country's economy. The plaintiffs contended that based on the laws of the Philippines a charge i of economic sabotage if proved, merits life imprisonment. Further their licence

to operate was terminated. The plaintiffs submitted that they had to meet the loss sustained by the workers which amounted to RM500,000 and that both the plaintiffs feared for their safety and that of their family.

Since the plaintiffs had lost their opportunity to collect agency fees the plaintiffs made various claims against the defendants for damages under various heads.

Having entered their defence the defendants filed an application (encl. 6) seeking security for costs of RM750,000 and that until such security is provided all proceedings be stayed. The learned senior assistant registrar who heard this application made an order on 29 October 1996 granting security for costs of RM50,000 and that the costs of the said application be costs in the cause. The plaintiffs being dissatisfied with the said decision appealed before me.

Since the plaintiffs had lost their opportunity to collect agency fees on the basis of about RM2,500 per Filipino employee, they claimed a sum of RM302,500 for the 121 workers whom they had enlisted.

They further claimed a sum of RM403,000 being special damages made up as follows:

(a) Hotel and other expenses for Muhamad Ali Daud, Puru and Karya in the various places in the Philippines from 11-18 August 1995, from 22-26 August 1995 and from 28 September 1995 - 9 October 1995 amounting to	RM 60,000
(b) Air ticket and transport charges	RM 25,000
(c) Cost of expenses of the plaintiffs during their stay in Kuala Lumpur in the course of preparing the travel documents for the 121 employees	RM 55,000
(d) Cost of advertisement for workers in the newspapers and over the radio	RM 18,000
(e) Salaries for the plaintiffs' workers in Kuala Lumpur and in Manila together with office charges and consultancy fees	RM115,000
(f) Fax charges and other related charges	RM130,000
	RM403,000

Case For The Defence

The 1st defendant is wholly owned by the 2nd defendant. The 1st defendant was involved in carrying out power related projects such as substation and transmission line works. The 2nd defendant's activities included engineering works for the oil and gas industries, civil engineering works equipment and electrical engineering. The 1st defendant had on 4 April 1995 appointed one Muhamad Ali Daud ('Ali') as its Business Development Executive. At about that same time Ali was introduced to the 1st plaintiff by one Kariya Lohmud (PW2) who gave evidence that he knew the said Ali since 1993. The defendants denied any knowledge of the power of attorney and the job order both dated 11 July 1995 and maintained that if such documents existed they were without the defendants' knowledge and/or their express or implied authority. Alternatively the defendants pleaded in their defence (para. 8) that the said workers order was not issued by them or through their agents or tenants but was obtained "by the same employee fraudulently and that the defendants are not bound to the contents and/or terms stated therein". They also contended that such documents were unlawfully issued. They also pleaded in para. 10 of the defence that the said workers order if issued by Ali was issued by the said Ali whilst acting outside the scope of his employment and without the knowledge and authority of the defendants. They also contended that the actions of the plaintiffs and Ali did not constitute an intention to create legal relations between the defendants and the plaintiffs and as such there was no binding contract between the plaintiffs and the defendants. They maintained that the plaintiffs failed to exercise prudence when they relied on the representation made by Ali when they failed to verify the accuracy of the alleged representation by the said Ali with the defendants or anyone of them.

Was Ali An Employee Of The 2nd Defendant

Based On Pleadings

Whilst admitting that Ali was an employee of the 1st defendant, the 2nd defendant denied in para. 6 of the defence that the illusive Ali was their employee.

However, in para. 8, both the defendants contended that the said workers order was obtained by Ali ('the employee') fraudulently and that the defendants were not bound by the contents. To my mind this implies that had the employee obtained the workers order in the proper manner it would have been acceptable. In other words even the 2nd defendant had impliedly agreed that in such circumstances Ali would be their employee. This view is further compounded by para. 10 of the defence. Here the defendants plead that if what is denied is that the said workers order was issued by Ali, then the said Ali was acting

outside the scope of his employment and without the knowledge and authority of the defendants and that the defendants are not bound by the contents therein. This plea clearly shows that there is no dispute with regard to the employment. The contention is that he acted outside the scope of his employment and without the defendants' knowledge. If Ali was the employee of only the 1st defendant then both paras. 8 and 10 should have been confined to the 1st defendant. It is pertinent for this court to make this liberal interpretation because in para. 20 of the defence both the defendants have pleaded the saving clause, that is:

> Save and hereinbefore expressly admitted, the defendants deny each and every allegation contained in the statement of claim as if the same were set out herein and traversed *seriatim.*

I find that because of this saving clause the defendants have expressly evinced an intention that their admissions must stand.

Just as manners maketh a man so do pleadings maketh a case. The power of pleadings is clearly manifested in this case. Precise and expressive language must be used. Any ambiguity in the pleadings must be construed against the party so pleading. In the circumstances based on the admissions in the pleadings alone I find that Ali was an employee of both the defendants when the power of attorney and the workers order were made and presented to the plaintiffs.

Based on Evidence

In any case the evidence of the defendants' witnesses showed to me that the 1st defendant acted as an agent of the 2nd defendant and that the 1st defendant was at all material times under the control and direction of the 2nd defendant. On this premise it is well within the right of the plaintiffs to argue that Ali was treated by both defendants interchangeably as one of the 2nd defendant's employees or agents. The documentary evidence to support this is seen in the letter of acceptance of an offer from MRCB-PNB Consortium addressed to the 2nd defendant and to their joint venture partner KEC International Ltd dated 16 May 1995, for a subcontract to build a 500 KV Transmission System Development for Tenaga Nasional Bhd ('the subcontract') priced at RM52 million. This letter of award was accepted on behalf of the 2nd defendant by the said Ali who signed as the manager. If there was to be any doubt as to Ali's right to represent the 2nd defendant, such doubt was extinguished when the 2nd defendant ratified Ali's acceptance by entering into an agreement dated 26 July 1995 with their joint venture partner and the MRCB-PNB Consortium for the said subcontract.

DW1, Mohd Wafa bin Abdul Rahman, the general manager of the 1st defendant, testified that at the relevant period the implementation of the said subcontract was equally divided between the 2nd defendant and KEC International Ltd whereby the 2nd defendant was to be responsible for setting up the transmission lines. The 1st defendant was assigned to carry out the project for the 2nd defendant. Hence it is my finding that although Ali was legally the employee of the 1st defendant, due to the blurred lines of the boundary between the 1st and the 2nd defendants, Ali was also treated by both defendants interchangeably as one of the 2nd defendant's employees or agents.

If further evidence of the defendants' witnesses is required DW1 said in his examination-in-chief that the 1st defendant had entered into a joint venture with three other parties, namely, Shams, Orbtech Sdn Bhd and Thiro, to form "Most Joint-Venture". He maintained that the purpose of Most Joint-Venture was to carry out the 2nd defendant's portion of the project. In fact Ahmad Fuad Jaafar (DW5) who is an employee of the 2nd defendant and a director of Orbtech Sdn Bhd at the relevant time confirmed that Ali had been assigned to the project as the project manager.

PW1 also testified that when he met Ali in June 1995 the latter had requested PW1 to supply foreign labour for the purposes of completing the project. PW1 agreed and requested Ali to prepare a power of attorney and a job order, both to be duly accredited by a Commissioner of Oaths, Wisma Putra and the Philippines Embassy in Kuala Lumpur for the purposes of fulfilling the requirements of the Philippines Overseas Employment and Administration Department (the POEA) in the Philippines before commencing the recruitment exercise.

According to the testimony of DW1 and DW5, Ali was removed as the project manager sometime in late June 1995. Much has been said by the defendants in their submission that the plaintiffs failed to challenge the fact that Ali was removed as the project manager in late June 1995 and that the failure to so cross-examine or challenge this issue was tantamount to acceptance of this fact. I do not think that the plaintiffs are challenging this fact. What the plaintiffs are saying is that once it is in evidence from the defendants themselves that Ali was the project manager then the onus is on the defendants to inform all parties concerned of his removal as such. I find however that apart from DW1 who testified that he had verbally informed Ali of the said removal there was no documentary evidence, such as letters, minutes of meetings, confirming his removal as the project manager, tendered to substantiate this. There was also no advertisement to the public at large that Ali was no longer the project manager and that he was no longer authorised to act for or to bind either of the defendants. The plaintiffs therefore were totally unaware of any change in Ali's position. That is why even though the power of attorney and the job

order are dated 11 July 1995 the plaintiffs continued to accept Ali's representation. Both PW1 and PW2 testified that whenever they visited Ali at the 1st defendant's office they had always asked for the project manager Ali. In fact, it was their evidence that this fact was never contradicted by their receptionist who had confirmed that Ali was indeed the project manager. The receptionist was not even called to refute this nor any explanation offered as to why she was not called.

I accept the evidence of both PW1 and PW2 that they had gone to several cities in the Philippines, such as Cagayan di Oro, Ligan City and Malawi City to shortlist candidates whilst Ali stayed in Manila to interview the shortlisted candidates.

I find as a fact that Ali stayed in Manila between 11-17 August 1995. Further I also accept as a fact that Ali had called DW1, who was his boss, in Malaysia on 14 and 15 August 1995 to extend his stay in the Philippines as he was unable to complete the interviews. These calls are evidenced by the plaintiffs' telephone records which were tendered. I also accept as a fact that Ali had again gone to the Philippines between 28 to 1 October to finalise the list of recruited workers after which he had selected 121 workers.

I also find as a fact that on his return to Malaysia, he had prepared the application documents for submission to the Immigration Department of Malaysia to obtain employment passes for the 121 workers. These application forms signed by Ali as the project manager and made in the name of the 2nd defendant have all been tendered as exhibits with an accompanying letter on the 2nd defendant's letterhead. It is noteworthy that the documents submitted to the Immigration Department included corporate details of both the 1st and 2nd defendants and copies of the subcontract. On 20 December 1995 the Malaysian Immigration Department issued their letter of approval to the 2nd defendant for the issuing of employment passes to the 121 workers. Subsequently Ali prepared and submitted on 21 December 1995, the documents for the actual issuance of the visas and employment passes including a standard form employment contract between the 1st defendant and each worker. By this time, the 121 workers had already resigned from their respective employments in the Philippines and were awaiting the air tickets to be sent by the defendants for their journey to Malaysia.

The defendants adduced evidence through DW1 that Ali had also made arrangements for recruitment of 264 Indian workers without consent which caused the defendants to lodge a police report against Ali and to suspend him. I have perused the said police report which was tendered and note that there is no mention in the said report lodged on 9 January 1996 at 9.08pm of the Philippines recruitment although according to his evidence, DW2 had already

received this information earlier on, on the same day between 9am to 10.30am from one Cik Azizah of the Immigration Department. This significant absence of the impropriety of the Philippines recruitment which ought to have been reflective in this police report made almost 12 hours later required an explanation. It never came. The absence of the Philippines recruitment in any police report lends weight to the plaintiffs' suggestion that the defendants were fully aware and had approved of the said recruitment.

Having considered all the evidence it is my judgment that the defendants are liable to the plaintiffs. In the *Principles of Company Law* by Professor H A J Ford the learned author says this at para. 532 with regard to the doctrine of ostensible authority:

> When a case arises in which the company denies that it gave, expressly or impliedly, authority to enter the transaction the company may nevertheless be held liable under the doctrine of ostensible authority, provided the contract is not ultra vires the company. Where the company holds out a person as having an authority that he might, consistently with the public documents, possess, a third party is in some cases entitled to assume that he has such authority.

This statement stems from the judgment of Diplock LJ in the case of *Freeman & Lockyer v. Buckhurst Park Properties (Mangal) Ltd & Anor* [1964] 2 QB 480 at 503:

> An 'apparent' or 'ostensible' authority, on the other hand, is a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the 'apparent' authority, so as to render the principal liable to perform any obligations imposed upon him by such contract. To the relationship so created the agent is a stranger. He need not be (although he generally is) aware of the existence of the representation but he must not purport to make the agreement as principal himself. The representation, when acted upon by the contractor by entering into a contract with the agent, operates as an estoppel, preventing the principal from asserting that he is not bound by the contract. It is irrelevant whether the agent had actual authority to enter into the contract.
>
> In ordinary business dealings the contractor at the time of entering into the contract can in the nature of things hardly ever rely on the 'actual' authority of the agent. His information as to the authority must be derived either from the principal or from the agent or from both, for they alone know what the agent's actual authority is. All that the contractor can know is what they tell him, which may or may not be true. In the ultimate analysis he relies either upon the representation of the principal, that is, apparent authority, or upon the representation of the agent, that is, warranty of authority.

As to how a company can make a representation that a person has its authority, Lord Diplock continued at p. 504:

> ... where the principal is not a natural person, but a fictitious person, namely, a corporation, two further factors arising from the legal characteristics of a corporation have to be borne in mind. The first is that the capacity of a corporation is limited by its constitution, that is, in the case of a company incorporated under the Companies Act, by its memorandum and articles of association; the second is that a corporation cannot do any act, and that includes making a representation, except through its agent.
>
> ...
>
> The second characteristics of a corporation, namely, that unlike a natural person it can only make a representation through an agent, has the consequence that in order to create an estoppel between the corporation and the contractor, the representation as to the authority of the agent which creates his 'apparent' authority must be made by some person or persons who have 'actual' authority from the corporation to make the representation."

And at p. 505 he explains this very lucidly, thus:

> The commonest form of representation by a principal creating an 'apparent' authority of an agent is by conduct, namely, by permitting the agent to act in the management or conduct of the principal's business. Thus, if in the case of a company the board of directors who have 'actual' authority under the memorandum and articles of association to manage the company's business permit the agent to act in the management or conduct of the company's business, they thereby represent to all persons dealing with such agent that he has authority to enter on behalf of the corporation into contracts of a kind which an agent authorised to do acts of the kind which he is in fact permitted to do usually enters into in the ordinary course of such business.

This position has been accepted in Malaysia by the then Federal Court in *Chew Hock San & Ors v. Connaught Housing Development Sdn Bhd* [1950-1985] MSCLC 145. I therefore find that the 1st defendant had clearly made a representation to the plaintiffs that Ali had authority to act as the project manager. In fact, DW1 had admitted in cross-examination that he had such authority to a very limited extent. When asked to explain he elaborated that Ali had the power to source but not to make the final decision on recruitment of labour. Thus it is apparent that he has the authority to "source" for labour. However, any limitations on his powers had never been conveyed to third parties, in particular to the plaintiffs; at least there is no such evidence before me to that effect.

The Indoor Management Rule To Apply

To my mind this is a classic case whereby I ought to apply the "indoor management" rule as expounded by the House of Lords in *Morris v. Kanssen* [1946] AC 459 which states:

> But persons contracting with a company and dealing in good faith may assume that acts within its constitution and powers have been properly and duly performed, and are not bound to inquire whether acts of internal management have been regular.

This rule requires no further elucidation. In fact, such is the potency of this principle that it has been enacted into our Companies Act 1965 as s. 20 which relates to *ultra vires* transactions. It is my judgment that the defendants ought not to be allowed to rely on internal arrangements or procedures to defeat the plaintiffs' claim, unless the defendants can prove that the plaintiffs had knowledge of such internal arrangements or procedures. This I find has not been done in this case.

The Final Advertisement

On 18 February 1996 the defendants made an announcement in the newspapers as follows:

> **ANNOUNCEMENT**
>
> We wish to inform that Encik Muhamad Ali @ Muhamad bin Daud, I/C No. 1558520 is no longer an employee of MMC Power Sdn Bhd. He, therefore, has no authority to transact any business dealings or make any arrangements for or on behalf of MMC Power Sdn Bhd, and/or its parent company MMC Engineering Services Sdn Bhd and/or any of its subsidiaries.
>
> THE MANAGEMENT OF
> MMC ENGINEERING SERVICES SDN BHD
> & MMC POWER SDN BHD"

The wording of this announcement clearly suggests that Ali was, prior to his termination, authorised to transact business dealings on behalf of both defendants. I therefore find that the 2nd defendant is jointly liable with the 1st defendant on the grounds that it controls the actions of the 1st defendant and thus the actions of Ali. In the circumstances, I have no hesitation in concluding that the defendants had breached their contractual duty by refusing to fulfil the employment agreements with the 121 Filipino workers in failing to send tickets and to employ them, thus depriving the plaintiffs of the opportunity to earn their commission.

Was Ali Acting Within The Course Of His Employment

The defendants contend that Ali acted with criminal intent. The defendants refer to the police report which they filed against Ali, the disciplinary proceedings that they took out against Ali and the fact that Ali was remanded. It is clear that Ali was never charged by the police after investigations and I must, giving him the benefit, conclude that no offence was committed by Ali. I reject the defendants' statement that according to the police, Ali was not charged in this country as the offence was committed overseas, as being hearsay and baseless. The investigating officer ought to have been called to make this statement if it is true.

I will not dwell much on the domestic enquiry except to say that its conduct leaves much to be desired. Despite the assertion by the 2nd defendant that both it and the 1st defendant are separate entities and despite that assertion that Ali was only the employee of the 1st defendant, the notice of domestic enquiry and list of charges dated 17 January 1996 were sent by the 2nd defendant to Ali. Further, the domestic enquiry itself was presided by a tribunal of the 2nd defendant's officers and held at the 2nd defendant's premises. The prosecuting officer was DW2, the 2nd defendant's human resources manager. The investigating officer was also the 2nd defendant's employee. It is perplexing to note that the only person who was entitled to be at this enquiry, namely DW1, who is the 1st defendant's officer, did not even give evidence. A perusal of the minutes of the domestic enquiry which was tendered in the agreed bundle showed that the chairman of the Tribunal himself gave evidence in this enquiry demonstrating his involvement, and thus casting aspersions upon his impartiality. For the purpose of this suit I am not prepared to make any reliance upon the conduct and outcome of the said domestic enquiry.

I have no hesitation in concluding that the defendants had breached their contractual duty in refusing to fulfil the employment agreements with the 121 Filipino workers in failing to send tickets and to employ them.

Damages

PW1 testified that it was the practice amongst recruiting agencies in the Philippines to accord with the POEA's policies that although instructions may be received from prospective employers overseas to recruit labour, agency fees of up to one month's salary is payable by the worker recruited to the recruiting agent. Sometimes, the worker will pay in advance but if the worker is not able to do that, an arrangement would be made with the employer to deduct and forward the worker's first month's salary to the agent. According to PW1, this is the practice under which he was acting as the defendants' recruitment agent.

PW1 also testified that in the Philippines the plaintiffs had collected an average of the equivalent of RM500 from each worker totalling RM60,500 from the 121 workers, for purposes of obtaining their respective passports, medical certificates, visas and POEA approval for deployment overseas. This was done by the plaintiffs on behalf of the defendants in furtherance of the objective of recruiting the workers.

At pp. 31-45 of 1CABD are found a list of 120 (not 121 as claimed) workers with their respective monthly salaries approved by the Malaysian Immigration Department and which total amounts to RM170,400. This the plaintiffs claim represents the one month's agency fees which they were prevented from earning and which they were entitled to.

In his evidence PW1 maintained that he had to ensure that a minimum of 4 million Pesos was put into a fixed deposit account and to produce the fixed deposit certificate to the Department of Labour and Employment to be eligible to obtain a licence prior to setting up his company. His reason for this large deposit was that the said money could be used to compensate any worker who had been cheated by the recruitment company.

His wife had returned to the Philippines and had discovered that their licence had been revoked and that all their assets have been frozen including their home in Paranaque. His bank account too has been frozen. He was subpoenaed by the Department of Justice, National Bureau of Investigation, Philippines to appear on a charge of "Estafa" and Illegal Recruitment. "Estafa" is the Tagalog equivalent of an offence involving economic sabotage. He however did not attend to give evidence but instead sought refuge in Malaysia to commence these proceedings and to vindicate himself. As proof of his earnings he tendered his income tax returns showing a net profit of Pesos 5,355,774.62 (2CABD p. 495). He maintained that there was every likelihood of him earning the same as there were recruitment orders from Saudi Arabia which he produced in court. He maintained that there was every likelihood of his licence being renewed as it has been done so previously since he had a good track record without any violations. He estimated his expenses arising out of the seizure of his property and goods at around RM400,000. He also claimed a loss of the expected agency fees out of this venture at around RM300,000.

Under cross-examination PW1 confirmed that there was no remuneration fees for his agency stated any where in the job order. However, he maintained that these were the requirements of their labour office and that the POEA allows them to ask for their fees only when the selection was over. In any event whilst I agree that there must be a certain fee to be paid to the plaintiffs for their recruitment services, this evidence orally given by the plaintiffs ought to have been corroborated by a letter from the Philippines Labour Office or

the POEA or anyone with sufficient knowledge to this effect, ought to have been subpoenaed from the Philippines Embassy in Kuala Lumpur to testify. Since I am of the view that a reasonable sum should be given to the plaintiffs and in the absence of evidence, other than the plaintiffs' own statement to this effect, and since I am satisfied that the total monthly earnings that would have been paid to the 120 workers recruited would have been RM170,400, I will award 50% of this sum amounting to RM85,200 as the plaintiffs' loss of agency fees.

As for the sum equivalent to RM500, I accept this figure to be correct and that this sum was collected from the 121 workers although finally only 120 were approved. Since the list of the 120 workers has been provided and approved by the Malaysian immigration authorities I accept the plaintiffs' evidence on this issue that they had collected a sum of Malaysian equivalent of RM500 from 121 workers amounting to RM60,500. This sum the plaintiffs are entitled to be reimbursed.

As to whether the 121 workers ought to be reimbursed from this sum I shall not make any order to that effect in this case. I reject the plaintiffs' claim for 5 further months' salary as a claim for the workers' loss of employment. There is no evidence before me that they were indeed unemployed. Surely, affidavit evidence on this issue could have been easily obtained during the case management stage.

With regard to the plaintiffs' claim for the loss of licence and livelihood and their performance bond I have no evidence before me that this figure was indeed deposited and if so forfeited. Perhaps after this decision there is the possibility that the plaintiffs might be allowed the renewal of their licence. In any case I have no evidence of this loss as such.

In respect of the loss of earnings the plaintiffs had shown by way of 2CABD p 495 that they had earned Pesos 5,355,774.62 which the plaintiffs approximate at RM450,000 and which approximation the defendants have not challenged. This sum was calculated prior to the deduction for income tax. There is clear evidence that the plaintiffs had to leave the Philippines to avoid a possible charge of economic sabotage. The plaintiffs have been in Malaysia since their arrival in February 1996 and the loss claimed between 24 February 1996 until October 1997 is about 1¾ years. I have not been told the amount that would be deducted as tax in the Philippines. I would therefore deduct on the Malaysian basis and would tax off 30%. The vicissitude in earnings is so uncertain. The plaintiffs' business depends on demand for labour. Taking judicial notice of the fact that all middle eastern countries have been repatriating foreign workers and that the same is applicable in Malaysia, and considering the down trend in the demand for foreign workers due to the

economic slowdown, I am of the view that on a conservative estimate, the plaintiffs could have earned a sum of RM120,000 per year. For the 1¾ years this would amount to RM210,000. Taking off 30% for income tax would leave a sum of RM147,000. I am not prepared to make any further awards for subsequent years for the simple reason that the present outlook paints a bleak picture for demand for foreign workers.

Loss Of Business Reputation

The only evidence that the plaintiffs led in this respect for loss of business reputation was when they tendered evidence regarding the good track record that they had in Saudi Arabia. I find that no evidence had been led to show that they had enjoyed goodwill and reputation in the Philippines. I therefore reject this claim. Similarly there is no basis for aggravated damages. In fact, the plaintiffs themselves never seriously pressed home this point in their submission.

Are The Losses Pure Economic Losses

The defendants contend that the losses allegedly suffered by the plaintiffs are pure economic losses for which they say the law denies recovery thereof. They relied on the House of Lords case of *Junior Books Ltd v. Veitchi Co Ltd* [1982] 3 All ER 201 where it was held that a claim for pure economic loss is not recoverable in tort in the absence of a special relationship in proximity imposing on the tortfeasor a duty of care to safeguard the plaintiff from suffering such economic loss.

It is my judgment that in order to have a right of action in negligence, a plaintiff must show that he was within the defendant's duty to take care, and he may then recover by way of damages for the direct and consequential loss reasonably foreseeable, but, though proof of direct loss is not an essential part of the claim, he must establish that he was within the scope of the defendant's duty of care. In *Kerajaan Malaysia v. Cheah Foong Chiew & Anor* [1993] 3 CLJ 143; [1993] 2 MLJ 439 the court refused to award damages for pure economic loss on the basis that there was no injury to person or to property arising out of the wrongful act. Peh Swee Chin FCJ (sitting as a High Court Judge in Ipoh) had occasion to consider this issue in *Teh Khem On & Anor v. Yeoh & Wu Development Sdn Bhd & Ors* [1996] 2 CLJ 1105; [1995] 2 MLJ 663. In that case the purchasers were only entitled to claim damages for breach of contract as the settlement of the house had only appeared after the conveyance of the house to the purchasers had been completed. The measure of damages was based on the cost of remedying the defect, that is, the cost of micropiling. The cost of investigation of the damage by the experts engaged by the plaintiff of RM21,141.35 which had been pleaded and proved was also

allowed. However, recently in *Dr. Abdul Hamid Abdul Rashid & Anor v. Jurusan Malaysia Consultants (sued as a firm) and Ors* [1997] 3 MLJ 546 James Foong J declined to follow the decision in *Teh Khem On* and held that a claim for pure economic loss can be entertained in an action for negligence; for otherwise the law would leave the entire group of subsequent purchasers of property in the country without relief against errant builders, engineers, architects and related personnel who might be liable.

It would seem that the rationale against the award of damages for pure economic loss is the fear of creating an extension of liability for an indeterminate time to an indeterminate class. I am inclined to accept the view of James Foong J. A claim for economic loss ought to be considered in a claim in negligence and not be confined to cases of contractual liability. The limitations imposed on its applicability are inequitable and do not serve the ends of justice. I therefore reject the submission of the defendants in this case.

Special Damages

With regard to proof relating to the various claims for special damages, the defendants submitted that no evidence had been led.

Case Management

Before this case came up for trial I had conducted numerous case management sessions in chambers with the same counsel who argued this case before me. On 24 June 1997 during the case management session, I directed each party to exchange all documents each intended to use at trial. The plaintiffs' counsel was then directed to bundle all documents, both the plaintiffs' as well as the defendants' into volumes called Common Agreed Bundle of Documents. In this case there were 2 volumes called 1CABD and 2CABD. It was also my directive that if either party wished the makers of any of the documents in the 2 bundles to attend court for cross-examination or to prove the documents, the party so requiring was to identify the said documents in the 2 volumes and to write to the other party requiring the makers' attendance. A copy of the said letter by either party addressed to the other was to be extended to the court. It was also my direction that any documents not so challenged would be deemed agreed and their contents admitted. Pursuant to my directions both parties sent in their objections to various documents by way of their respective letters. On 30 June 1997 being the next case management date, I went through with both counsel their various requests for the production of the respective makers of the various documents.

However, the defendants never objected to any of the documents that proved the claims relating to special damages. In any event, the plaintiffs have not in their submission or through witnesses showed to this court how they had arrived at the figure of RM500,000 being the damages sought in respect of the Philippine workers and the sum of RM403,000 in respect of the various items of special damages enumerated in the statement of claim. In any event the figures not challenged by the defendants in both 1 and 2CABD are in US Dollars and in Pesos. It is not the duty of this court to ferret out the various items of claims and to see which document tallies with which item of the claim, made by the plaintiffs. As was said by Lord Goddard CJ in *Bonham-Carter v. Hyde Park Hotel, Limited* [1984] 64 TLR 177 at 178:

> ... Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, and, so to speak, throw them at the head of the Court, saying: "This is what I have lost; I ask you to give me these damages." They have to prove it.

Special damages are a category unto themselves. They must be specifically pleaded and proved. It is not the court's function with a view to seeing justice done, to fit the jig-saw puzzle of the plaintiffs' claim. Each item claimed ought to have been specifically proved by referring the court at least in the submission, to the related unchallenged documents in the Common Agreed Bundle of Documents. Unfortunately, this was never done. In the circumstances, I make no award at all for special damages on the basis that they have never been proved to this court's satisfaction.

In the circumstances, having found for the plaintiffs I make the following awards:

(a) RM60,500 being the amount paid by the 121 selected workers to the plaintiffs for obtaining their respective passports, medical certificates, visas and POEA approval for deployment overseas.

(b) RM85,200 as plaintiffs' loss of agency fees.

(c) RM147,000 as loss of earnings for one year nine months.

(d) Interest on the above at 4% from the date of filing the writ to date.

(e) Costs.